

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD JOSEPH HERZBERG,

Defendant-Appellant.

UNPUBLISHED

March 20, 2007

No. 265546

Saginaw Circuit Court

LC No. 04-024692-FH

Before: O’Connell, P.J., and Murray and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for stalking, MCL 750.411h(1)(d). He was sentenced as an habitual offender, second offense, MCL 769.10, to sixty days in jail and sixty months’ probation. We affirm. During defendant’s marriage to the victim, defendant exhibited violent, physically abusive, and controlling behavior. He abused drugs and alcohol, and openly threatened the life of his ex-wife and his younger son with his firearms. During the last incident, which involved defendant pinning the victim to the floor and threatening to kill them, his younger son called the police, and defendant was arrested. The victim obtained a divorce and a personal protection order (PPO) against defendant, but he repeatedly defied the order and was eventually imprisoned. This case arose when, while incarcerated, defendant called his ex-wife and left a short message on her answering machine. He also sent his older, grown son a letter with specific messages for her and called her again to discuss his younger son.

On appeal, defendant first argues that the trial court erred by holding that the letter and the short message on the answering machine could constitute “contact” within the meaning of MCL 750.411h(1)(d). We disagree. The letter at issue clearly contains a message that defendant sought to communicate to the victim about his frustration with her PPO. Although indirect, the statute defines unconsented contact as “any contact . . . that is initiated or continued . . . in disregard of that individual’s expressed desire that the contact be avoided or discontinued.” MCL 750.411h(1)(e). At the outset, we disagree with defendant’s attempts to downplay the telephone contacts. The statute clearly recognizes that it is the persistence of the culprit, the constant uneasiness, and the implied danger that traumatizes a stalked individual. *Id.* Regarding the messages in the letters, the law has always recognized that culpability arises from criminal contact accomplished by setting in motion a force intended to cause a criminal result, even if the result is different than anticipated. See *People v Chapman*, 62 Mich 280, 286; 28 NW 896 (1886). In this case, defendant sought to use his son to convey a threatening message, and his son accomplished that purpose, although he delivered the entire letter to his mother rather than

orally relating the message. In any event, the trial court did not err by determining that “any contact” could mean “indirect contact” as the jury inquired, and that defendant’s actions here could constitute contact proscribed by the statute.

Next, defendant argues that he did not possess the requisite mens rea to commit the crime at issue, because he did not intend to harm his ex-wife. We disagree. The only language in MCL 750.411h that specifically refers to the culprit’s intent is the definition of stalking. “‘Stalking’ means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested” MCL 750.411h(1)(d). The term “harassment” and the phrase “course of conduct” are elsewhere defined in the statute, but it is clear from this context alone that “willful” refers to the harassing course of conduct and not the ultimate result. To hold otherwise would allow defendant to continue harassing and contacting the victim without abatement simply because he genuinely feels that maintaining contact will eventually restore his family and serve his noble purposes. Such a result does not have support in the statute or in common sense. Defendant’s phone calls demonstrated his intent to call the victim, irrespective of her desire to live free from his disruptive impositions. The messages he sent in his letters likewise demonstrated his intent to communicate to her, albeit through innuendo and implication, the dangers of resisting his desire to contact her directly. Under the circumstances, the trial court did not err by submitting the case to the jury even without evidence that defendant specifically intended to traumatize the victim.

Affirmed.

/s/ Peter D. O’Connell
/s/ Christopher M. Murray
/s/ Alton T. Davis